PUBLIC PROSECUTOR

v.

LAM TSHIN PO & 7 ORS.

HIGH COURT SABAH & SARAWAK, SANDAKAN
TUAN IAN H. C. CHIN J
[CRIMINAL APPEAL NO. S(41) 18 OF 1994]
18 AUGUST 1995

CRIMINAL LAW & PROCEDURE: *Sentencing - Appeal by prosecutor - Accused charged with offences under the Forests Enactment - Offences punishable by imprisonment and fine - Accused convicted and fined on pleading guilty - Whether sentence of imprisonment mandatory - Section 45(1) Interpretation and General Clauses Enactment 1963 - Whether fines manifestly inadequate.*

This was an appeal by the public prosecutor against the sentence imposed on two accused who together with others were jointly charged and convicted of three offences under ss. 20(b)(i), 20(2) & 30(g) of the Forests Enactment which offences were all punishable with imprisonment and fine. The two accused were fined, respectively, RM350, RM300 and RM250 with the appropriate default imprisonment. The learned deputy public prosecutor submitted that the fines were manifestly inadequate and that the learned Magistrate had erred in law in not imposing the mandatory jail term. Counsel for the accused submitted that the Court had a discretion whether to order imprisonment.

Held:

[1] The Court still has a discretion whether to impose a custodial sentence and it is not mandatory because the section of the Forests Enactment must be read subject to s. 45(1) of the Interpretation and General Clauses Act 1963 which states "Whenever in or by virtue of any State law more than one penalty is prescribed for an offence, the use of the word "and" shall signify that the penalties may be inflicted alternatively or cumulatively."

[2] Many extenuating circumstances were adverted to in mitigation and the learned Magistrate also took into account the plea of guilty. Given the circumstances, she cannot be said to have erred in imposing a non custodial sentence. However the fines were mere pin-pricks since the two accused are of means. The Court therefore sets aside the fines and imposes fines, respectively, of RM2,000, RM1,000 and RM1,000 to be paid by tomorrow in default one month imprisonment.

[Appeal allowed in terms mentioned]

Cases referred to:
Philip Lau Chee Heng v. PP [1988] 3 MLJ 107 ***(dist)***
Nili Anak Gumbang v. PP [1985] 1 MLJ 464 ***(foll)***

Legislation referred to:
Firearms (Increased Penalties) Act 1971, s. 4
Forests Enactment, ss. 20(b)(i), 20(2), 30(g), 33(1)
Immigration Enactment 1956, s. 56
Interpretation and General Clauses Act, 1963, s. 45(1)
Interpretation and General Clauses Enactment, s. 38

For the appellant - Mahmud bin Hj. Abdullah, DPP
For the respondent - Dennis Rantau

JUDGMENT

Ian H. C. Chin J:

History

This is an appeal by the Public Prosecutor against the sentence imposed on Lam Tshin Po and Tai Kim Sin @ Tai Kon Yun who were, together with others, jointly charged and convicted of three offences, *viz*., (1) of unauthorised cutting, collecting, felling and removing of 37 trees from a forest reserve under s. 20(2) of the Forests Enactment, (2) of unauthorised possession, custody and control of 37 timber logs, in a forest reserve, under s. 30(g) of the Enactment, and (3) of unauthorised erection or construction of a *kongsi* in a forest reserve under s. 20(b)(i) of the Enactment. As for the first offence, the punishment is provided by s. 20(2) of the Enactment, the relevant part of which says:

> ... on conviction shall be punished with imprisonment for a term of not less than thirty days which may extend to seven years and with fine.

The second offence carries the penalty under s. 30 of the Enactment, the relevant part of which says:

> ... shall be guilty of an offence and liable to imprisonment for two years and a fine of five thousand dollars.

while the third offence is punishable under the general provision of s. 33(1) of the Enactment which provides that the offender :

> ... shall be liable to imprisonment for twelve months and a fine of two thousand dollars.

The said two accused pleaded guilty to the three counts and were each convicted and fined, respectively, RM350, RM300 and RM250 together with the appropriate default imprisonment.

Contentions

Mr. Mahmud bin Hj. Abdullah, learned deputy public prosecutor, submitted that the fines imposed on the three offences were manifestly inadequate and that the learned Magistrate had erred in law in not imposing a jail term for the offence (1). The learned deputy submitted that a sentence of imprisonment is mandatory and he, after referring to *Philip Lau Chee Heng v. PP* [1988] 3 MLJ 107, which is a decision on the meaning of the words of s. 4 of the Firearms (Increased Penalties) Act 1971, *viz*.:

> ... shall be punished with imprisonment for life and with whipping with not less than six strokes.

where Chong Siew Fai J (as he then was) held that the section imposes a mandatory sentence of life imprisonment and six strokes whipping, argued that similarly the words of s. 20(2) of the Enactment also impose a mandatory jail sentence and a fine. Mr. Dennis Rantau, learned Counsel for the two accused, both here and below, argued that the Court still has a discretion whether to order imprisonment and learned Counsel referred to *Nili Anak Gumbang v. PP* [1985] 1 MLJ 464 where the Court there dealt with s. 56 of the Immigration Enactment 1956 which provided for an offender to be liable to imprisonment for a term of not less than one year and not more than seven years and a fine not exceeding twenty thousand dollars and whipping and where Power J said (p. 465):

> ... It seems to me clear, by virtue of s. 38 of the Interpretation and General Clauses Enactment 1959, which states that "whenever, in or by virtue of any written law, more than one penalty is prescribed for an offence, the use of the word 'and' shall signify that the penalties may be

inflicted alternatively or cumulatively..." that it is open to the Court under the penalty section to impose either a prison sentence or a fine or whipping but that, if the Court does decide to impose a prison sentence, it must be for not less than 1 year.

Clearly, the decision of *Nili Anak Gumbang v. PP* was the result of s. 38 of the Interpretation and General Clauses Enactment which modified the normal meaning of the word concerned. There is a similar provision in the Interpretation and General Clauses Enactment, 1963, of Sabah, and it reads:

45(1) Whenever in or by virtue of any State law more than one penalty is prescribed for an offence, the use of the word "and" shall signify that the penalties may be inflicted alternatively or cumulatively.

Conclusions

This means that the Court still has a discretion whether to impose a custodial sentence and it is not, contrary to what the learned deputy had submitted, mandatory to impose a custodial sentence because that section of the Forests Enactment must be read subject to s. 45(1) of the Interpretation and General Clauses Act, 1963. *Philip Lau Chee Heng v. PP* is distinguishable in that it was a decision on s. 4 of the Firearms (Increased Penalties) Act 1971 for which there is no similar legislation modifying its meaning.

It remains to be considered whether the sentences of the learned Magistrate ought to be disturbed on the ground that they were manifestly inadequate. It will be recalled that the two accused were, for the three offences, each fined RM350, RM300 and RM250. Mr. Dennis Rantau had pleaded at length in the lower Court and his eloquence had properly moved the learned Magistrate to pass the sentences she did. Many extenuating circumstances were adverted to, like the absence of any loss of revenue to the government, the huge financial loss incurred by the two accused as a result of the detention of other logs, numbering 1,585, which were unconnected with the offences of this case but which detention rendered the logs commercially useless and the huge financial loss as a result of the detention of two tractors which were also unconnected with the offences of this case. The learned Magistrate had also taken into account the plea of guilty. Given the circumstances that were laid before the learned Magistrate, I cannot see how it can be said she had erred in not imposing a custodial sentence. However, the fines are mere pin pricks since the two accused, by their own admissions, are of means which can be considered substantial. I therefore set aside the said fines and instead impose the fines, respectively of, RM2,000, RM1,000 and RM1,000. There shall be imprisonment of one month for any default in the payment of the fines. The two accused have until tomorrow to pay their fines.

I therefore allow the appeal in the terms I have mentioned, *supra.*